



2011

Writing Effective Settlement Agreements

Cindy M. Wheeler
Director, Employee Relations
Federal Aviation Administration



Good Settlement Agreements

- Eliminate potential litigation risk
- End the case in a legal way that is mutually acceptable to all parties
- Should make good business sense

Factors to Consider

Agency Should Not Settle:

- For “nuisance value”
- For more than the employee could obtain in their chosen forum
- Where settling would set bad precedent
- Where settlement would violate law or Agency policy

General Rules

- Plain Language
 - Language should be clear
 - Make sure language says exactly what you mean – intent should be obvious
 - Avoid Vague or Ambiguous Language

If language is so vague that intent cannot be determined, the agreement may be void

 - Be as specific as possible
 - Avoid “Legalese”
 - **AVOID ORAL AGREEMENTS**

Parol Evidence

- Extraneous evidence such as an oral agreement that is not included in the relevant written document.
- In construing the terms of a settlement agreement, the words of the agreement itself are of paramount importance, and parol evidence will be considered only if the agreement is ambiguous.

Market v. DOT, 110 MSPR 196 (MSPB 2008)

Consideration

- Settlement agreements are bilateral contracts – to be enforceable, each party must receive a benefit to which they would not already be entitled

Agency receives the benefit of the employee withdrawing the case, resigning, etc.

Examples of invalid settlements: Agreements to only treat employee with dignity and respect or where Agency only agrees not to engage in reprisal.

General Rule

Know the scope of your authority to settle

If the agreement's provisions require concurrence or authorization of another department, you must obtain that concurrence or authorization before you finalize the agreement.

Ex: In most agencies, only the Finance office can waive debts, therefore if you want to include debt forgiveness as part of the agreement, you would have to obtain Finance's concurrence first.

General Rules

- Tax Consequences are the employee's responsibility
- Confidential Clauses (if used -- better to avoid)
Include terms regarding disclosure to those with need to know to carry out the terms of the agreement and to those authorized or required by law such as investigators.

State that the settlement can be cited in any future forums concerning the employee.

Gizzarelli v. Dept. of the Army, 90 MSPR 269 (MSPB 2001)

What to Include

Global Settlement Release

Employee agrees to drop all claims against the Agency up to the date of signing this agreement

Ex: Employee agrees that execution of this Settlement Agreement irrevocably releases the (agency name) and its employees, officers, and agents, in their individual and official capacities, from any actions, claims, complaints and other matters arising out of the complainant's employment with (agency name) through the effective date of this Agreement to include any actions the Complainant brought or could have brought in any forum, including, but not limited to all claims for backpay, costs, attorney fees, expenses, and/or damages of any kind.

What to Include

Zipper Clause

Limit Settlement to what is found in the Agreement

Example: “This Settlement Agreement contains the entire understanding of the Parties. The Agreement reflects all of the terms and conditions of settlement and no other promises, oral or written, have been made that are not reflect in this Agreement.”

What to Include

Make Agreement Non-Precedential

Ex: “The Parties agree that this Settlement Agreement is non-precedential and shall not be cited in any other proceeding or in any forum except to enforce the terms of the Agreement, however, it can be cited in further forums concerning the employee.”

Be careful! Make sure you allow for use of the agreement in enforcement proceedings.

What to Include

Separate the Provisions – if it makes sense

One bad clause should not spoil the rest of the Agreement

Ex: “Should any provision of this Agreement become invalid, illegal, or unenforceable, that shall not affect the validity or enforceability of other provisions of the Agreement.”

What to Include

Non-Admission of Fault Clause

Ex: “The Parties agree that this Settlement Agreement has been reached without final judgment on the merits of the allegations and shall in no way constitute an admission of liability, wrongdoing, or discrimination by the Agency, its’ officers or employees, and shall not be represented as such by either Party in this or any other proceeding or litigation.”

What Not to Include

Illegal Provisions

Unenforceable and may make the entire agreement void

Union Contract Violations

Union must agree to contract violations

Provisions that Violate Agency Policy

Coordinate with appropriate HR Office to ensure policy is not violated

What Not to Include

Avoid Provisions Dealing with Annuities!

- Retirement Trust Fund cannot be used as a litigation settlement fund
- A settlement cannot conflict with express provisions of CSRS or FERS

See OPM's Guidelines for Settlement of Federal Personnel Actions Involving Retirement Benefits

What Not to Include

Avoid time limits the Agency may not be able to meet

- Be Realistic – 60 days?
- Check with others to ensure timelines can be met (back pay and retroactive personnel actions can take a considerable amount of time to process)

What Not to Include

- Waiver of future EEO rights
- Waiver of future Office of Worker's Compensation rights

Last Chance Agreements

- Contains terms under which the employee will be given a last opportunity to keep or gain back his/her employment, usually when the agency would otherwise remove the employee for performance, conduct, or leave deficiencies
- Time Frame – usually two or three years
- Waiver of appeal rights – must be stated

Last Chance Agreements

Words are of paramount importance in determining the parties' intent – be specific

Ex: Satisfactory attendance (no more than three unscheduled absences in any six-month period)

Ex: Must sign and comply with all the terms of an EAP established rehabilitation plan

Often contain a statement that violation of any provision of the LCA and/or any future misconduct by the employee **will** result in removal.

Good Faith

Parties must act in Good Faith

Bad Faith: Provisions that misled or deceive
 Provisions that are intentionally
 ambiguous

Allegations of “bad faith” or “mutual mistake” must be proven by the party bringing the allegation

Mutual mistake – mistake of fact both parties misunderstood

Ex: Both parties assumed employee was eligible to retire when he was not

EEO Settlements

- When can settlement occur?
 - Informal stage – at mediation
 - Formal stage – any time between the time the Complainant requests a hearing to the time the judge renders a final decision

EEO Settlement Requirements

- Agreement must be knowing and voluntary
- Signed by both parties
- No waiver of prospective EEO rights

Older Worker's Benefit and Protection Act (OWBPA)

- Requires specific language for settlements involving people over 40 years old
- Must be in writing and understandable
- Specifically refer to Age Discrimination in Employment Act (ADEA) rights or claims
- Advise individual in writing to consult an attorney before signing
- Provide 21 days to consider and at least seven days to revoke after signing

MSPB Settlements

- Agreement must be part of the Record to be enforceable by the Board
- Agreement must be in writing
- Appeal must be within the jurisdiction of the MSPB in order for the agreement to be enforceable by the MSPB

Clean Record Clauses

- Be Cautious – Inherent moral hazard
- Requires Agency to provide information to prospective employers that is consistent with a clean record
- Avoid language that requires a “positive” or “good” recommendation, or is otherwise vague
- Appellant should agree on a designated position that provides the information for a set time period

Clean Record

Agreement should not prohibit agency employees from providing information to an investigator or a provision to prevent former supervisors or co-workers provided as references from providing information

Sample language: After the effective date of this agreement, should the (agency name) be contacted in connection with potential employment of the former employee as part of a security investigation or if the former employee uses former coworkers or supervisors as a reference, management will provide the facts that gave rise to the dispute resulting in this agreement. This is an agreed upon exception to the clean record provision.

Prospective Clauses

- Require resignation or retirement by a certain date
- Include provisions that Employee refrain permanently from applying for or accepting employment with the Agency or through a contractor with the Agency
- Attorney fees – list a flat amount or a not-to-exceed amount
- Employee is responsible for paying applicable taxes

Reemployment & Back Pay

- Special considerations
- May need to adjust contribution to employee benefit programs
- Grade/pay level changes
 - Retirement computations change, including employee and agency deductions for retirement
 - Social security, FEGLI and FEHB deductions
 - TSP calculations

Back Pay calculations can be complicated –
Provisions stating “backpay at the straight time rate” can help

Final Considerations

- Settle only issues in appeal
- When settling personnel actions, consider total cost to government – a salary increase such as a QSI or in-band increase has a high cost because employee receives extra money each year
- Have others review your settlement language to ensure language is understandable

Keep Records

- Keep documentation about your settlement discussions
- May need documentation to defend enforcement actions or determine disagreements about what a specific term means

Questions

